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IN THE

Supreme Court of the United States

JOHN GEDDES LAWRENCE and TYRON GARNER,

Petitioners,

—v.—

STATE OF TEXAS,

Respondent.

ON WRIT OF *CERTIORARI* TO THE
COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT

BRIEF OF THE AMERICAN PUBLIC HEALTH ASSOCIATION, NATIONAL MENTAL HEALTH ASSOCIATION, AMERICAN ORTHOPSYCHIATRIC ASSOCIATION, AIDS ACTION, NATIONAL ALLIANCE OF STATE AND TERRITORIAL AIDS DIRECTORS, ASSOCIATION OF NURSES IN AIDS CARE, NATIONAL MINORITY AIDS COUNCIL, AND THE WHITMAN-WALKER CLINIC AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*

Amici are organizations dedicated to public health and to supporting scientifically valid research on physical and mental health issues. Nearly all are national in scope and several have a particular focus on reducing the incidence of HIV infection through prevention and education efforts. *Amici*, based on their expertise, each reject the notion that criminalization of adult consensual private sexual activity is beneficial to public health. To the contrary, *amici* believe that sodomy laws like the Texas Homosexual Conduct Law actually undermine HIV/AIDS prevention efforts and harm the mental and physical health of lesbians and gay men. *Amici* submit this brief to refute the "public health" assertions advanced by *amicus* Pro Family Law Center in its brief opposing *certiorari* and to provide the Court with accurate scientific information concerning the adverse public health implications of the Homosexual Conduct Law.[1]

The American Public Health Association ("APHA") is devoted to the promotion and protection of personal and environmental health and to disease prevention. Founded in 1872, APHA is the world's largest health organization, with over 50,000 affiliated members from all disciplines and specialties in public health.

Established in 1909, the National Mental Health Association ("NMHA") is the country's oldest and largest nonprofit organization addressing all aspects of mental health and mental illness. NMHA is dedicated to promoting mental health, preventing mental disorders, and achieving victory over mental illness through advocacy, education, research, and service.

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[1] All parties have consented to the submission of this brief through letters filed with the Clerk of the Court. *Amici* state that no portion of this brief was authored by counsel for a party and that no outside person or entity made a monetary contribution to the preparation or submission of this brief.

The American Orthopsychiatric Association, founded in 1924, provides a common ground for collaborative study, research, and knowledge exchange among individuals from a variety of disciplines engaged in preventive, treatment, and advocacy approaches to mental health.

Founded in 1984, AIDS Action is a network of 3,200 AIDS service organizations across the country and the one million HIV-positive Americans they serve. AIDS Action is solely dedicated to responsible federal policy for improved HIV/AIDS care and services, vigorous medical research, and effective prevention.

The National Alliance of State and Territorial AIDS Directors ("NASTAD") is a nonprofit national association of state health department directors with responsibility for administering government-funded HIV/AIDS health care, prevention, education, and supportive services. Founded in 1992, NASTAD is dedicated to reducing the incidence of HIV infection in the United States and its territories; providing comprehensive, compassionate, and quality care to all persons living with HIV/AIDS; and the development of responsible and compassionate public AIDS policies.

The National Minority AIDS Council, established in 1987, is the premier national organization dedicated to developing leadership within communities of color to address the challenges of HIV/AIDS and promoting sound national HIV/AIDS, health, and social policies that are responsive to the needs of the diverse communities of color impacted by HIV/AIDS.

The Association of Nurses in AIDS Care is a nonprofit professional nursing organization committed to fostering the individual and collective professional development of nurses involved in the delivery of health care to persons infected or affected by HIV and to promoting the health, welfare, and rights of all HIV infected persons.

Whitman-Walker Clinic is a nonprofit community-based health clinic serving the Washington D.C. metropolitan region. Founded in the 1970s as a gay and lesbian health

clinic, Whitman-Walker has become a principal provider of medical and support services to all persons with HIV/AIDS, regardless of sexual orientation, in the Capitol area.

SUMMARY OF THE ARGUMENT

The State of Texas has never defended the constitutionality of the Homosexual Conduct Law, Tex. Penal Code Ann. § 21.06 (Vernon 1994), based on any public health interest. *Amicus* Pro Family Life Center ("PFLC") nevertheless argues that Texas's criminalization of sodomy by gay men or lesbians, but not by heterosexuals, is justified by public health considerations. (Brief of *Amicus Curiae* Pro Family Law Center in Support of Denying Review ("PFLC Br."), dated August 16, 2002). According to PFLC, "[t]he greater public health consequences of same-sex sodomy provide a rational basis for discrimination against such conduct." (PFLC Br. at 2). Focusing on Acquired Immune Deficiency Syndrome (AIDS), PFLC asserts that sodomy laws applying only to same-sex couples are "good and necessary" to "regulate conduct which can result in disease and death." (*Id.*)

The State's decision not to adopt the purported justification suggested by PFLC is entirely appropriate, first, because the legislative history belies any public health rationale for the law. The Homosexual Conduct Law was adopted well before the first known diagnosis of AIDS, and a subsequent attempt to increase its penalties specifically to address that disease was rejected by the legislature. In light of the State's failure to invoke any public health rationale for the law, the Court should not even entertain this theory.

Moreover, an objective evaluation of medical science concerning the transmission of Human Immunodeficiency Virus (HIV), the virus that causes AIDS, vitiates any argument that the Homosexual Conduct Law is rationally related to preventing the disease. The law, which is at once both egregiously over and underinclusive as a means of preventing the spread of HIV, is so far removed from this purported public health objective that it would be

impossible to credit preventing AIDS as its legitimate legislative purpose, even if the State so claimed.

HIV may be transmitted by an infected person during certain forms of unprotected sexual activity, regardless of the sex of the partners. Yet the Homosexual Conduct Law criminalizes a wide range of sexual activity – and only between members of the same sex – without regard to the science of AIDS transmission. Accordingly, the law bans conduct unlikely to result in HIV transmission while simultaneously doing nothing to discourage other behavior that carries significant risk. For example, although an HIV-positive man who engages in unprotected vaginal intercourse with numerous women is vastly more likely to transmit HIV than an infected gay man in a monogamous same-sex relationship who engages in protected sex with his partner, the law prohibits only the latter activity. The Homosexual Conduct Law also criminalizes sex between two women, which presents virtually no risk of HIV transmission. The law even bans sexual activity between same-sex couples where neither partner is infected with HIV and transmission is thus medically impossible. The disparity between the law's scope and the way in which HIV is actually transmitted renders the Homosexual Conduct Law irrational as a means of serving this purported public health goal.

Not only is the law not rationally related to reducing the spread of AIDS, it has the actual effect of undermining public health. Objective social science research demonstrates that the law reduces the effectiveness of legitimate AIDS prevention strategies, impeding efforts to eradicate the disease. Moreover, the Homosexual Conduct Law, like sodomy laws generally, inflicts significant mental and physical harm on lesbians and gay men. Far from legitimizing this flawed law, an objective assessment of public health interests confirms the absence of any rational basis to sustain it.

ARGUMENT

POINT I

THE COURT SHOULD NOT ENTERTAIN A HYPOTHETICAL "PUBLIC HEALTH" RATIONALE FOR THE HOMOSEXUAL CONDUCT LAW THAT TEXAS HAS NEVER ADVANCED AND THAT ITS LEGISLATURE IN FACT SPECIFICALLY CONSIDERED AND REJECTED

The State of Texas has consistently maintained that the sole "legitimate state interest" furthered by the Homosexual Conduct Law is "preserving public morals." *Lawrence v. State*, 41 S.W.3d 349, 354 (Tex. App. 2001); *see also* Respondent's Br. in Opp'n to the Pet. for a Writ of Cert. at 14-20. The State has never argued that the law advances *any* public health interest, much less the baseless one proffered by *amicus* PFLC that it is a "good and necessary law to preserve the right of [Texas] to regulate conduct which can result in disease and death," specifically AIDS. (PFLC Br. at 2). The State's failure to embrace this hypothetical justification is unsurprising, since any such rationale is completely belied by the law's actual legislative history.

First, as the court below recognized, "*[f]or most of its history*, Texas has deemed deviate sexual intercourse, *i.e.*, sodomy, to be unlawful whether performed by persons of the same or different sex." 41 S.W.3d at 353 & n.7 (citing statutes dating back to 1879) (emphasis added). The Homosexual Conduct Law dates to 1973, when the Texas legislature "repealed its prohibition of sodomy generally, except when performed by persons of the same sex." *Id.* at 353. The first reported AIDS case, however, occurred in 1981. *See* Centers for Disease Control and Prevention ("CDC"), *The HIV/AIDS Epidemic: The First 10 Years*, 40 Morbidity & Mortality Wkly. Rep. 357, 357 (1991) ("On June 5, 1981, the first cases of an illness subsequently defined as acquired immunodeficiency syndrome (AIDS) were reported by health-care providers in California and CDC.") Accordingly, the Texas legislature could not have enacted

the Homosexual Conduct Law to curtail the spread of AIDS. *See Baker v. Wade*, 106 F.R.D. 526, 534 (N.D. Tex.) ("It is obvious that the Texas Legislature did not consider the AIDS problem when it passed § 21.06 as part of the general revision of the Penal Code in 1974. Indeed, the AIDS epidemic did not even exist at that time."), *rev'd on other grounds*, 769 F.2d 289 (5th Cir. 1985).

Moreover, the same specious public health arguments raised by *amicus* PFLC were actually presented to and rejected by the Texas legislature. In 1983, several Texas representatives sought to amend the Homosexual Conduct Law, purportedly for the specific purpose of using it to address AIDS. Their proposal, H.B. 2138, "would have broadened § 21.06 to prohibit any homosexual conduct or 'sexual contact'" and "dramatically increased" the punishment for violations of the law from the $200 fine then proscribed to "2-10 years imprisonment and a $5,000 fine for the first offense ('third-degree felony'); 2-20 years imprisonment and a $10,000 fine for subsequent offenses ('second degree felony')." *Baker*, 106 F.R.D. at 530.

The Texas House Criminal Jurisprudence Committee conducted hearings on H.B. 2138, considering testimony from Dr. Paul Cameron remarkably similar to the arguments now advanced by PFLC.[2] Specifically, "Dr. Cameron testified, in substance, that AIDS is directly related to, and spread by, homosexual conduct – and that H.B. 2138 was needed to prevent homosexual conduct from destroying this country's public health." *Id.* at 531. After the Committee heard this AIDS "evidence," it declined to adopt the proposed changes, referring H.B. 2138 to subcommittee where the bill died at the close of the 1983 legislative session. *Id.*

[2] Dr. Cameron, who is cited as an authority in a publication referenced by PFLC (*see* PFLC Br. at 11 n.6 (citing Medical Institute for Sexual Health, *Executive Summary: Health Implications Associated with Homosexuality* (1999)), has been discredited in both the scientific community and the courts. *See Resolution of the Neb. Psychol. Ass'n* (Oct. 19, 1984) ("The science and profession of psychology in Nebraska as represented by the Nebraska Psychological Association, formally dissociates itself from the representations and interpretations of scientific literature offered by Dr. Paul Cameron in his writings and public statements on sexuality."), *available at* http://psychology.ucdavis.edu/rainbow/html/facts_cameron_sheet.html; *Baker*, 106 F.R.D. at 536 (referring to Dr. Cameron's testimony that homosexuals abuse children at greater rate than heterosexuals as "fraud or misrepresentations" on court); *see also id.* at 536 n.31 (noting Dr. Cameron's resignation from American Psychological Association to avoid investigation into charges of unethical conduct, including "misrepresentation of . . . research sources on homosexuality; inflammatory and inaccurate public statements about homosexuals; and his fabrications to a Nebraska newspaper about the supposed sexual mutilation of a four year old boy by a homosexual"). (footnote continued)

This history underscores that Texas's Homosexual Conduct Law was not intended "to regulate conduct which can result in disease and death." (PFLC Br. at 2). Accordingly, that purported justification cannot now sustain the law's constitutionality. *See Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975) ("This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation.").

This Court should not consider, much less accept, a purported justification that is not even advanced by the State and that, subsequent to the law's adoption, was expressly considered and rejected by the Texas legislature. Accordingly, even if it were not otherwise groundless (as demonstrated below), PFLC's *post hoc* public health argument cannot sustain the constitutionality of the Homosexual Conduct Law.

POINT II

THE HOMOSEXUAL CONDUCT LAW DOES NOT BEAR EVEN A RATIONAL RELATIONSHIP TO ANY PUBLIC HEALTH PURPOSE

Even assuming that the State of Texas were belatedly to embrace a public health rationale for the Homosexual Conduct Law, such a purported justification could not pass constitutional muster. Because the law targets only lesbians and gay men, there must be a medically rational fit between that class-based distinction and the purported public health objective. Here, however, the Homosexual Conduct Law is so grossly under and overinclusive as a means of preventing HIV transmission that it cannot be taken seriously as a public health measure. The law is not only an ineffective means of controlling the spread of HIV – it actually undermines legitimate education, outreach, and treatment programs that do serve this end, ironically frustrating the very public health goal that *amicus* PFLC invokes. These facts render any purported public health justification utterly irrational and incapable of sustaining the law's constitutionality.

A. A Medically Reasonable and Rational Relationship Must Exist Between a Law and its Purported Public Health Objective

This Court long ago held that intrusive legislation serving public health objectives is constitutionally permissible only if it bears a "real or substantial relation to the protection of the public health." *Jacobson v. Massachusetts*, 197 U.S. 11, 28, 31 (1905). Where a public health measure is applied "in reference to particular persons in [] an arbitrary, unreasonable manner," that situation may "compel the courts to interfere for the protection of such persons." *Id.* at 28.

Although *Jacobson* predated modern equal protection jurisprudence, its core principle remains relevant. *See* Scott Burris, *Rationality Review and the Politics of Public Health*, 34

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Vill. L. Rev. 933, 966 (1989) ("*Jacobson*'s approach has continued to be the model for health cases.") (citing cases). Even under the least demanding test applied to assess the constitutionality of legislative action, a rational relationship must exist between a law and its purported public health objective. *See Craigmiles v. Giles*, 312 F.3d 220, 226 (6th Cir. 2002) (invalidating provision of Tennessee Funeral Directors and Embalmers Act that forbid anyone from selling caskets without a license because "[e]ven if casket selection has an effect on public health and safety, restricting the retailing of caskets to licensed funeral directors bears no rational relationship to managing that effect").

Where a law targets a specific class of citizens in the name of public health, the Equal Protection Clause requires some fit between that classification and the law's purported objective. "The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985).[3] In particular, where a law's "sheer breadth is so discontinuous with the reasons offered for it that the [law] seems inexplicable by anything but animus toward the class it affects[,] it lacks a rational relationship to legitimate state interests." *Romer v. Evans*, 517 U.S. 620, 632 (1996).

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[3] In *Cleburne*, which involved a constitutional challenge to a zoning ordinance that required permits for group homes for the mentally retarded, the State of Texas argued to this Court that the ordinance should be stricken on "rational basis" review. *See* Brief of *Amici Curiae* State of Texas and Texas Department of Mental Health and Mental Retardation, *Cleburne* (No. 84-468). The State maintained that the city was required to "come forward with some difference in the adverse impact of group homes for the mentally retarded – as compared to the impact of nursing homes for the aged, turberculosis sanitariums, halfway houses for youthful offenders, etc. – on the health, safety, morals or general welfare of the community." *Id.* The State argued that because the city could not make that showing, the ordinance did not survive "rational basis" scrutiny. *Id.* The same test that Texas urged there applies here.

In assessing whether a rational relationship exists between a law and a professed public health objective, the medical grounding of the legislature's judgment is a critical consideration. For example, a "statute's superficial earmarks as a health measure" will not satisfy "rational basis" review if it is so overly broad as to proscribe conduct wholly unrelated to the purported public health purpose. *See Eisenstadt v. Baird*, 405 U.S. 438, 450-52 (1972) (statute prohibiting distribution of all contraceptives to unmarried persons had "no public health purpose," in part because "'certain contraceptive medication and devices constitute no hazard to health, in which event . . . the statute swept too broadly in its prohibition.'") (citation omitted).[4] Likewise, where a statute that purports to further public health has the actual effect of undermining that goal, the law cannot be sustained on "rational basis" scrutiny. *See Craigmiles*, 312 F.3d at 226 (claim that restricting casket sales to licensed funeral directors was rationally related to public health interest of casket quality control rejected in part because restriction actually appeared to have *adverse* effect on casket quality).

B. Because the Homosexual Conduct Law is at Once Grossly Over and Underinclusive as a Means of Preventing AIDS, It Cannot Plausibly Be Viewed as a Legitimate Public Health Measure

The Homosexual Conduct Law's lack of any legitimate public health rationale is immediately apparent based on the disconnect between its classification and the principal health

[4] Although *Eisenstadt* is frequently misunderstood as a "fundamental rights" case, it actually employed "rational basis" review. *See Eisenstadt*, 405 U.S. at 447 n.7 ("Of course, if we were to conclude that the Massachusetts statute impinges upon fundamental freedoms . . . the statutory classification would have to be not merely rationally related to a valid public purpose but necessary to the achievement of a compelling state interest. But . . . we do not have to address the statute's validity under that test because the law fails to satisfy even the more lenient equal protection standard.") (citations omitted).

problem that *amicus* PFLC claims it addresses – the transmission of HIV, the virus that causes AIDS. The Homosexual Conduct Law prohibits all contact between any part of the genitals of one person and the mouth or anus of another person of the same sex. Tex. Penal Code Ann. §§ 21.01(1), 21.06 (Vernon 1994).[5] The law is "at once too narrow and too broad" as a means of preventing AIDS, belying any "rational relationship to [that] independent and legitimate legislative end." *Romer*, 517 U.S. at 633. Indeed, the purported public health goal is so divorced from the actual statutory language that it would be impossible to credit it as the legislature's legitimate purpose. *Id.* at 635 ("The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them . . . . It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests. . . .").[6]

[5] In addition, the law proscribes the penetration of the genitals or anus of another person of the same sex with an object. *Id.*

[6] The strategy of justifying laws reflecting invidious discrimination with the purported advancement of public health is not new. Indeed, miscegenation laws, which were declared unconstitutional in *Loving v. Virginia*, 388 U.S. 1 (1967), were frequently defended as necessary public health measures. *See, e.g., Scott v. State*, 39 Ga. 321, 323 (1869) ("The amalgamation of the races is not only unnatural, but is always productive of deplorable results. Our daily observation shows us, that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength, to the full-blood of either race."); *see also* Leti Volpp, *American Mestizo: Filipinos and Antimiscegenation Laws in California*, 33 U.C. Davis L. Rev. 795, 802 (2000) (California miscegenation law, as applied to Chinese Americans, was "presented as a public health concern, for Chinese were assumed . . . to be full of filth and disease"); Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 J. Contemp. Health L. & Pol'y 1, 6 (1996) (eugenicist defenders of miscegenation laws "insisted that the 'social problem classes' were a public health issue and a medical problem"); Phillip Reilly, *The Virginia Racial Integrity Act Revisited: The Plecker-Laughlin Correspondence: 1928-1930*, 16 Am. J. Med. Genetics 483 (1983) (chronicling role of "public health advocate" Dr. Walter Ashby Plecker in passage of Virginia Racial (footnote continued)

The Homosexual Conduct Law is strikingly over and underinclusive in several specific ways. First, the law is underinclusive in that it does not regulate heterosexual vaginal intercourse, an increasingly common means of HIV transmission in the United States. Worldwide, vaginal intercourse is the leading route of HIV transmission. *See* CDC, *Can I Get HIV from Having Vaginal Sex?*, *at* http://www.cdc.gov/hiv/pubs/faq/faq21.htm; Thomas C. Quinn, *Viral Load, Circumcision, and Heterosexual Transmission*, 12 The Hopkins HIV Report 1, 5 (2000), *available at* http://hopkins-aids.edu/publications/report/may00_1.html ("Heterosexual transmission remains the most common mode of transmission of HIV throughout the world. Over 85% of new infections are acquired heterosexually. . . ."). Although the aggregate numbers of U.S. AIDS cases is currently higher for men having sex with men than for heterosexuals, the CDC reports that from 1996 through 2001, "[b]y risk, AIDS incidence declined sharply and then leveled among men who have sex with men." CDC, 13 *HIV/AIDS Surveillance Report* 1, 5 (2001). In contrast, "[a]mong persons exposed through heterosexual contact, incidence declined slowly from 1996 through 1998 but seems to have increased through 2001. *Id.* Heterosexual activity poses a particularly grave risk of HIV transmission for women. In a 2000 survey, 38% of women reported with HIV/AIDS were found to have been infected through heterosexual exposure. *See* CDC, *HIV/AIDS Among US Women: Minority and Young Women at Continuing Risk*, at

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Integrity Act). The parallel between the history of miscegenation and sodomy laws has been noted by members of this Court. *See Bowers v. Hardwick*, 478 U.S. 186, 210 n.5 (1986) (Blackmun, J., dissenting) (noting that parallel between miscegenation and sodomy laws "is almost uncanny"); *id.* at 216 n.9 (Stevens, J., dissenting) (observing that "miscegenation was once treated as a crime similar to sodomy").

http://www.cdc.gov/hiv/pubs/facts/women.htm.[7] In Texas, there is an "increasing spread of new infections among females." Texas Dep't of Health Bureau of HIV & STD Prevention, *HIV/STD Annual Report* 8 (2001). Worldwide, women now account for half of all reported cases of adult HIV infection. *See* CDC, *Basic Statistics*, *at* http://www.cdc.gov/hiv/stats.htm.

Second, the law's proscriptions with regard to anal sex are similarly underinclusive. The risk of HIV transmission during unprotected anal sex with an infected partner is the same for heterosexuals and homosexuals. Yet the statute bans this activity only for same-sex couples. Given that many studies demonstrate that heterosexuals regularly engage in this sexual activity, there is no public health explanation for the distinction. *See* Pamela Bean, *Containing the Spread of HIV Infection Among High-Risk Groups*, 21 Am. Clinical Laboratory 19, 19 (June 2002) ("the sheer number of heterosexual couples engaging in [anal intercourse] far outnumber the total population of men who have sex with men"); Janice I. Baldwin & John D. Baldwin, *Heterosexual Anal Intercourse: An Understudied, High-Risk Sexual Behavior*, 29 Archives of Sexual Behavior 357, 362 (Aug. 2000) (nearly 23% of surveyed sexually active heterosexual college students engaged in anal intercourse; condoms were used only 20.9% of time); Gary J. Gates & Freya L. Sonenstein, *Heterosexual Genital Sexual Activity Among Adolescent Males: 1988 and 1995*, 32 Family Plan. Persp. 295, 296 (Nov./Dec. 2000) (11% of surveyed heterosexual adolescent males had engaged in anal sex with females).

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[7] Injection drug use ("IDU") was the infection route for another 25% of women, and receipt of blood transfusions, blood components, or tissue accounted for 1%. *Id.* Although the risk exposure for the remaining 36% of AIDS cases among women was deemed "not reported or identified," the CDC noted that "most will be reclassified as heterosexual or IDU after follow-up investigations are complete." *Id.*

Third, the law is overinclusive in that it bans sexual practices that are not likely to transmit HIV. For example, the risk of HIV transmission through cunnilingus – which is banned between same-sex, but not opposite-sex partners – is virtually nil compared to anal and vaginal intercourse. CDC, *HIV/AIDS Update, Preventing the Sexual Transmission of HIV, the Virus That Causes AIDS: What You Should Know About Oral Sex, at* ftp://ftp.cdcnpin.org/Updates/oralsex.pdf. Similarly, a recent study showed that the risk of a man acquiring HIV through unprotected oral sex with another man is extremely low, with a near-zero chance of infection. Kimberly Page-Shafer et al., *Risk of HIV Infection Attributable to Oral Sex Among Men Who Have Sex With Men and in the Population of Men Who Have Sex With Men*, 16 AIDS 2350, 2350-51 (2002). Another recent study likewise showed that frequent unprotected oral sex carries a low risk of infection. CDC, *Primary HIV Infection Associated With Oral Transmission, at* http://www.cdc.gov/hiv/pubs/facts/oralsexqa.htm (7.8% (8 of 102) of HIV infections attributed exclusively to oral sex; in half of these cases, oral problems such as bleeding gums existed).[8]

Fourth, the Homosexual Conduct Law applies equally to sexual activity between two men and between two women even though studies consistently show that the risk of HIV transmission between female partners is negligible. *See* CDC, *HIV/AIDS & U.S. Women Who Have Sex with Women (WSW), at* http://www.cdc.gov/hiv/pubs/facts/wsw.htm;

[8] In addition to the law's overbreadth in banning oral sex, it is at the same time underinclusive in this regard. The law precludes only lesbians and gay men from engaging in this behavior, even though heterosexuals regularly engage in the practice. *See* John H. Gagnon, *A Comparative Study of the Couple in the Social Organization of Sexuality in France and the United States*, 38 J. Sex Res. 10 (Feb. 2001), *available at* http://www.findarticles.com/cf_dls/m2372/1_38/75820035/p1/article.jhtml (35% of heterosexual males and 26% of heterosexual females in United States engaged in oral sex during their last sexual event); Gates & Sonenstein, *supra*, at 296 (49% of surveyed heterosexual adolescent males had received oral sex from females, 39% had performed oral sex on females).

Rimi Shah & Caroline Bradbeer, *Women and HIV - Revisited Ten Years On*, 11 Int. J. STD & AIDS 277, 278 (May 2000); Vickie M. Mays et al., *The Risk of HIV Infection for Lesbians and Other Women Who Have Sex with Women: Implications for HIV Research, Prevention, Policy, and Services*, 2 Women's Health: Res. on Gender, Behav. & Pol'y 119, 125 (1996). Drawing lines simply because sex partners are of the same sex, irrespective of their gender, is not rationally related to controlling the spread of HIV.[9]

Fifth, the law does not distinguish between safe and unsafe sexual practices. For example, the law fails to differentiate unprotected sexual activity from that performed with a condom. In studies of uninfected people who were involved in sexual relationships with HIV-positive partners, 98-100% of those people who used latex condoms correctly and consistently did not become infected,

[9] PFLC's own source, a monograph published by the "Medical Institute for Sexual Health," states that female-to-female transmission of HIV is "relatively rare" and that "[w]omen who have sex only with women are at significantly decreased risk of sexually transmitted disease." Medical Institute for Sexual Health, *Health Implications Associated With Homosexuality* 59, 62 (1999). These are no small concessions from an organization whose literature otherwise "characterize[s] homosexual relationships as both unhealthy and wrong and suggests that for those who have a 'homosexual orientation,' refraining from sex forever may be preferable for 'health, moral or religious reasons.'" Human Rights Watch, 14 *Ignorance Only, HIV/AIDS, Human Rights, and Federally Funded Abstinence-Only Programs in the United States, Texas: A Case Study* 1, 38 (Sept. 2002), *available at* http://www.hrw.org/reports/2002/usa0902/ USA0902.pdf. PFLC completely ignores the Medical Institute's observations concerning the overall remote risk of STD transmission in lesbian sexual activities, seizing instead upon the Medical Institute's discussion of one particular STD, bacterial vaginosis, which is found at a higher rate among lesbians than heterosexual women. (PFLC Br. at 11). PFLC also curiously cites a purported elevated risk of breast and ovarian cancer among women who have sex with women (*id.*), without even attempting to explain what relevance such statistics could possibly have to a ban on sexual activity or to establish any cause and effect relationship between sexual orientation and such health concerns.

even with repeated sexual contact. CDC, *How Effective Are Latex Condoms in Preventing HIV?, at* http://www.cdc.gov/hiv/pubs/faq/faq23.htm. *See also* Quinn, *supra,* at 5 ("consistent condom use is the most important measure for preventing HIV transmission"). Nor does the Homosexual Conduct Law's proscription against the use of "objects" in sexual activity between same-sex partners bear any rational relationship to reducing the spread of AIDS. Penetration with an object cannot itself transmit the HIV virus and therefore can be an extremely safe form of sexual activity from the perspective of AIDS prevention. In any event, whatever "public health" risks could conceivably be associated with this practice have nothing to do with whether the sexual partners are of the same or different genders.

Sixth, the Homosexual Conduct Law does not account in any manner for the HIV status of sex partners. Obviously, there is no risk of transmission where both partners are free of the virus. Particularly in the case of a monogamous relationship between healthy partners, criminalization of sexual activity is utterly irrational as a public health measure.

The complete lack of fit between the classifications drawn by the Homosexual Conduct Law and the actual science of HIV transmission belies the public health rationale offered by *amicus* PFLC. Several state courts have accordingly rejected such a purported "public health" justification for same-sex sodomy laws. *See Gryczan v. State,* 942 P.2d 112, 124 (Mont. 1997) ("[T]he inclusion of behavior not associated with the spread of AIDS and HIV and the exclusion of high-risk behavior among those other than homosexuals indicate the absence of any clear relationship between the statute and any public health goals."); *Commonwealth v. Wasson,* 842 S.W.2d 487, 501 (Ky. 1992) ("The only medical evidence in the record before us rules out any distinction between male-male and male-female anal intercourse as a method of preventing AIDS.").

PFLC tries to obscure the lack of a medically rational relationship between the Homosexual Conduct Law and the ways in which HIV is transmitted by stressing the higher incidence of AIDS in the homosexual male population and the statistical impact on life expectancy that has followed from that higher incidence. (PFLC Br. at 9-10). Increased mortality, however, is an effect of AIDS and not of homosexuality itself. The authors of the study cited by PFLC as establishing the "dramatic impact on the age of mortality for those involved in same-sex relationships" (PFLC Br. at 10) have explained that the study measured the impact of *HIV infection* on gay and bisexual men and did not establish that homosexual couples *per se* have a dramatically increased mortality rate. Robert S. Hogg et al., *Letter to the Editor: Gay Life Expectancy Revisited,* 30 Int'l J. Epidemiol. 1499 (2001).[10]

Under the Homosexual Conduct Law, a gay man or lesbian who is disease-free and engages in protected monogamous sexual relations is branded a criminal, while an infected heterosexual who engages in unprotected intercourse with multiple partners does not violate that law. This result is clearly irrational if the true purpose of the law is to stop the spread of AIDS. Simply calling the Homosexual Conduct Law a "public health measure" does not make it one in the absence of a rational basis for the law's distinction between same-sex and opposite-sex activity. PFLC's presentation to this Court appears to be

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[10] The authors also have expressed frustration that their work has been distorted by extremist anti-gay groups to justify discrimination. *Id.* ("These homophobic groups appear more interested in restricting the human rights of gays and bisexuals rather than promoting their health and well being . . . . We do not condone the use of our research in a manner that restricts the political or human rights of gay and bisexual men or any other group."). Moreover, the authors have noted that a revisited study would show a "greatly improved" life expectancy for gay and bisexual men because "[d]eaths from HIV infection have declined dramatically in this population since 1996." *Id.*

grounded not in science, but in animus towards gay people – an illegitimate basis for government discrimination even under rational relationship review. *See Romer*, 517 U.S. at 633-35.[11]

C. The Homosexual Conduct Law In Fact Undermines Public Health Interests, Defeating Any Possibility that the Law Could Be Defended as Rationally Related to Such a Justification

The egregious under and overbreadth of the Homosexual Conduct Law itself renders untenable the notion that it advances the public health. But any vestige of a public health rationale is eliminated by clear evidence that the law (i) actually *undermines* legitimate AIDS prevention programs and (ii) itself inflicts harm upon lesbians and gay men.

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[11] PFLC's animus toward gay people is neither subtle nor disguised. PFLC bills itself as "the nation's only law-oriented entity devoted exclusively to opposing the homosexual agenda," with a mission "to develop and promote strategies to defeat the 'gay' movement." See PFLC Home Page, *at* http://abidingtruth.com. PFLC's president, Scott Douglas Lively, Esq. is, by his own admission, "a full-time activist" against the advancement of civil rights for gay people, writing that "the organized homosexual political movement may be the most destructive social force in America today." Scott Lively, *Why and How to Defeat the "Gay" Movement* 1, 1 (2001). Indeed, PFLC believes that "the most important function of sodomy laws is to deter the spread of homosexuality in society," and that sodomy itself is an "act of sadism and violence" akin to wife beating. *In Defense of Sodomy Laws*, *at* http://www.abidingtruth.com/In%20Defense%20of%20Sodomy%20laws.html. PFLC's extreme positions regarding homosexuality are exemplified by Mr. Lively's book *The Pink Swastika: Homosexuality in the Nazi Party* (1995), which purportedly "documents the homosexual roots of Nazism and the central role of homosexuals in the Holocaust." *See* Biographical Profile of Scott Lively, *at* http://www.abidingtruth.com/about/. In a subsequent publication, Mr. Lively purports to have detected "a dark and powerful homosexual presence in other historical periods: the Spanish Inquisition, the French 'Reign of Terror,' the era of South African apartheid, and the two centuries of American slavery." Scott Lively, *The Poisoned Stream: "Gay" Influence in Human History, Volume One, Germany 1890 - 1945*, Author's Forward, *available at* http://www.abidingtruth.com/poisoned stream/forward.html.

1. *The Law Does Not Deter the Spread of AIDS and Impedes the Effectiveness of AIDS Prevention Efforts*

There is no evidence that criminalizing homosexual activity deters unsafe sexual practices. In fact, the trend to *de*-criminalize sodomy has coincided with a *decrease* in HIV transmission rates among gay men.[12] This is not surprising because sodomy laws have the perverse effect of impeding efforts to curb the transmission of HIV. "[T]he generalized use of the criminal law is unlikely to become an effective tool for public health," Lawrence O. Gostin, *Public Health Law: Power, Duty, Restraint* 234 (2000), and criminalization in this context is particularly likely to interfere with public health protection for a number of reasons.

First, sodomy laws hamper efforts intended to advise the public how to minimize the danger of contracting AIDS. Researchers report dramatic changes in sexual behavior reducing the risk of AIDS in areas where major educational efforts, such as teaching "safer sex" guidelines, have been employed. *See, e.g.*, Jeffrey D. Fisher et al., *Changing AIDS Risk Behavior: Effects of an Intervention Emphasizing AIDS Risk Reduction Information, Motivation, and Behavioral Skills in a College Student Population*, 15 Health Psychol. 114 (1996); M. Morris & L. Dean, *Effect of Sexual Behavior Change on Long-Term Human Immunodeficiency Virus Prevalence Among Homosexual Men*, 140 Am. J. Epidemiol. 217 (1994). The Homosexual Conduct Law interferes with AIDS public education efforts by putting health educators in the untenable position of appearing to facilitate unlawful behavior. Under the Texas law, educators who encourage

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[12] Between 1996 and 2001 – as the rate of HIV transmission in the category of men having sex with men "declined sharply and then leveled," CDC, 13 *HIV/AIDS Surveillance Report* 1, 5 (2001) – nine states repudiated their sodomy laws by legislative or judicial action: Tennessee (1996), Montana (1997), Georgia (1998), Rhode Island (1998), Maryland (1999), New York (2000), Arizona (2001), and Minnesota (2001).

"safer sex" practices as proven alternatives to risky behavior may be seen as advocating criminal conduct.[13]

Moreover, the Homosexual Conduct Law discourages Texas's gay citizens from seeking accurate public health information concerning HIV transmission. Openly gay people who attend educational presentations on AIDS risk reduction may fear that they are admitting to engaging in criminal activity. The fear of prosecution also may deter lesbians and gay men from speaking candidly about their sexual behaviors and asking necessary questions. As the Joint United Nations Programme on HIV/AIDS (UNAIDS) has written, in advocating repeal of criminal sodomy laws:

> Criminalizing behaviour forces individuals to lead "double lives" to hide it (particularly in isolated or rural communities where the threat of identification is very real), making access to educational programmes more difficult. Such laws place health workers and educators at the risk of aiding and abetting offences, because they can be accused of promoting or encouraging these sexual acts when in fact, they are merely advising how to carry them out safely. Such a situation tends to create suspicion and hostility between health workers, communities and authorities, rather than an atmosphere of trust and cooperation.

UNAIDS, *Handbook for Legislators on HIV/AIDS, Law and Human Rights: Action to Combat HIV/AIDS in View of Its Devastating Human, Economic and Social Impact* 55 (1999). *See also Gryczan v. State*, 942 P.2d 112, 124 (Mont. 1997)

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[13] The Homosexual Conduct Law also has been used to justify cuts in funding to AIDS educational programs for gay men in Texas — an even more direct impact obviously inconsistent with any "public health" rationale for the law. *See* John Gallagher, *Refusal to Rule*, The Advocate, Feb. 22, 1994, at 24.

("[E]ducation and counseling are the most effective means of changing behavior and [] criminal statutes seriously undermine public health strategies by causing individuals to conceal or distort relevant information and by inhibiting effective public education efforts.").

In addition to the adverse impact of sodomy laws on public education efforts, such laws may deter gay people from being candid with their physicians concerning behavior that may expose them to HIV and in some cases may discourage them from getting tested or seeking treatment. *See* Scott Dunbar & Susan Rehm, *On Visibility: AIDS, Deception By Patients, and the Responsibility of the Doctor*, 18 J. Med. Ethics 180, 184-85 (1992) (in case studies of HIV-positive gay men, "[f]ear of condemnation by the doctor . . . restricted communication towards the goal of the maintenance of the patient's health, their mutual concern. The lack of trust which inhibits truth-telling results in mutual and progressive isolation which impedes the provision of optimal care."); J. Kelly Strader, *Constitutional Challenges to the Criminalization of Same-Sex Sexual Activities: State Interest in HIV-AIDS Issues*, 70 Denv. U. L. Rev. 337, 356 (1992) ("[P]revention and treatment of HIV-AIDS depends upon continuing research and treatment. Same-sex sodomy laws deter gay men, as a high risk group, from providing information to health officials and researchers. The laws discourage homosexuals from seeking prompt and adequate testing, counseling and medical care."); *see also Campbell v. Sundquist*, 926 S.W.2d 250, 263-64 (Tenn. Ct. App. 1996) (noting that fear of prosecution causes some gay individuals to avoid medical treatment and others to avoid being tested for infection); *State v. Saunders*, 381 A.2d 334, 342 (N.J. 1977) (observing "counter-productive" nature of fornication statute as means of combating venereal disease because "[t]he fear of being prosecuted for the 'crime' of fornication can only deter people from seeking [] necessary treatment").

For all these reasons, the Homosexual Conduct Law undermines the real public health measures — education,

testing, and treatment – that have proven effective in reducing the spread of AIDS.

2. *The Law Adversely Impacts the Mental and Physical Health of Lesbians and Gay Men*

In addition to impeding AIDS prevention efforts, the Homosexual Conduct Law harms the mental and physical health of gay people. By criminalizing core aspects of their intimate lives, the law serves to stigmatize gay people as "deviants." This stigmatization leads, in some gay people, to internalized self-hatred and consequential depression and other mental health problems. *See, e.g.*, Melanie D. Otis & William F. Skinner, *The Prevalence of Victimization and its Effect on Mental Well-Being Among Lesbian and Gay People*, 30 J. Homosex. 93, 110 (1996) (victimization adversely impacts mental health, as measured by depression, in lesbians and gay men); Ilan H. Meyer, *Minority Stress and Mental Health in Gay Men*, 36 J. Health & Soc. Behav. 38, 51 (1995) ("[R]esults indicated that *internalized homophobia* [defined as direction of societal negative attitudes toward the self], expectations of rejection and discrimination (*stigma*), and actual events of discrimination and violence (*prejudice*) . . . predict psychological distress in gay men.").[14]

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[14] Indeed, the internalized self-hatred that sodomy laws create or facilitate may have the perverse effect of increasing the likelihood that some gay people will engage in high risk sexual behavior. *See, e.g.*, David M. Huebner et al., *The Impact of Internalized Homophobia on HIV Preventive Interventions*, 30 Am. J. Community Psychol. 327 (June 2002) (internalized self-hatred by some homosexuals poses barriers to HIV prevention efforts); Margaret Rosario et al., *The Coming-Out Process and Its Adaptational and Health-Related Associations Among Gay, Lesbian, and Bisexual Youths: Stipulation and Exploration of a Model*, 29 Am. J. Community Psychol. 133, 156 (2001) (low self-esteem and emotional distress in gay youth population related to higher rate of unprotected sex). In contrast, fostering self esteem facilitates AIDS prevention efforts. *See* John C. Gonsiorek & Michael Shernoff, *AIDS Prevention and Public Policy: The Experience of Gay Males*, in *Homosexuality: Research Implications for Public Policy* 240 (John C. Gonsiorek & James D. Weinrich eds. 1991) ("[A] positive self-image with regard to homosexuality is a foundation (footnote continued)

Sodomy laws also reinforce negative views about gay people, perpetuating prejudice in some segments of society at large. Historically, expressions of bias against gay people have been particularly intense. Gay people "have been the object of some of the deepest prejudice and hatred in American society." Gary B. Melton, *Public Policy and Private Prejudice*, 44 Am. Psychologist 933, 934 (1989). *See also* Meyer, *supra*, at 38-42. Although the great majority of gay people successfully cope with the stresses created by societal stigma and develop a positive identity based upon their sexual orientation,[15] some do not and, consequently, become more troubled and dysfunctional.[16]

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upon which gay men successfully participate in and implement HIV infection prevention strategies.")

[15] *See* Shari Brotman et al., *The Impact of Coming Out on Health and Health Care Access: The Experiences of Gay, Lesbian, Bisexual and Two-Spirit People*, 15 J. Health Soc. Pol'y 1 (2002) (coming out leads to positive mental health for gay people); Yoel Elizur, *Family Support and Acceptance, Gay Male Identity Formation, and Psychological Adjustment: A Path Model*, 40 Family Process 125, 127 (Summer 2001) (even after "a particularly stressful adolescence," many gay and lesbian adults "make a rebound toward greater mental health and [] achieve a level of psychological adjustment on par with heterosexual comparison groups").

[16] The harmful effects of prejudice generally include "considerable distress, including feelings of personal loss, rejection, humiliation, and depression; agitation, restlessness, and sleep disturbances; somatic symptoms such as headaches and diarrhea; and deterioration in personal relationships." Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 L. & Sexuality 133, 147 (1991); *see also* Linda D. Garnets et al., *Violence and Victimization of Lesbians and Gay Men: Mental Health Consequences*, 5 J. Interpersonal Violence 366 (1990). Being the target of discrimination also leads to a sense that life is unfair and unjust, a persistent sense of vulnerability, and the feeling of being punished for being gay. Gregory M. Herek, *Stigma, Prejudice and Violence Against Lesbians and Gay Men*, in *Homosexuality: Research Implications for Public Policy* 60 (John C. Gonsiorek & James D. Weinrich eds. 1991) (hereinafter "Herek, *Stigma*"); *see also* Daniel E. Bontempo & Anthony R. D'Augelli, *Effects of At-School Victimization and Sexual Orientation on Lesbian, Gay, or Bisexual Youths' Health Risk Behavior*, 30 J. Adolesc. Health 364, 371-73 (2002) (homosexual youth experiencing high (footnote continued)

It is unsurprising, therefore, that a recent study cited by PFLC showed a higher incidence of mental health problems among homosexuals than among heterosexuals. (PFLC Br. at 11-12 (citing Theo G.M. Sandfort et al., *Same-Sex Sexual Behavior and Psychiatric Disorders*, 58 Archives of Gen. Psych. 85 (2001)).[17] These findings are consistent with data from mental health studies on other minority populations that have encountered systemic societal prejudice and hardly establish that gay people are inherently prone to mental health problems.[18] PFLC's reliance on this study to defend the Homosexual Conduct Law ironically uses the effects of oppression to rationalize and justify further oppression. Rather than ameliorating a public health concern, the Homosexual Conduct Law further stigmatizes gay people, perpetuating the prejudice that creates the very mental health problems discussed above.

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levels of at-school victimization also reported increased levels of substance abuse, suicidal tendencies, and risky sexual behavior); Otis & Skinner, *supra*, at 93-121 (victimization exacerbates depression in both lesbians and gay men).

[17] In fact, the authors acknowledge in this study that "[t]he effects of social factors on the mental health status of homosexual men and women have been well documented in studies, which found a relationship between experiences of stigma, prejudice, and discrimination and mental health status." Sandfort, *supra*, at 89.

[18] Numerous studies have found a correlation between reports of discrimination and psychological distress in minority populations. *See* Anderson J. Franklin & Nancy Boyd-Franklin, *Invisibility Syndrome: A Clinical Model of the Effects of Racism on African-American Males*, 70 Am. J. Orthopsychiatry 33 (2000); Samuel Noh, *Discrimination and Emotional Well-Being: Perceived Racial Discrimination, Depression and Coping: A Study of Southeast Asian Refugees in Canada*, 40 J. Health & Soc. Behav. 193 (1999); James S. Jackson et al., *Racism and the Physical and Mental Health Status of African Americans: A Thirteen Year National Panel Study*, 6 Ethnicity & Disease 132 (1996); Hortensia Amaro et al., *Family and Work Predictors of Psychological Well-Being Among Hispanic Women Professionals*, 11 Psychol. Women Q. 505 (1987).

The Homosexual Conduct Law may also endanger the physical well-being of gay people, by appearing to validate hostility, discrimination, and even violence against them. Lesbians and gay men in the United States are the victims of extensive discrimination and violence. In a series of surveys, an average of 44% of gay people reported that they had been subjected to threats of violence, and 80% reported verbal abuse, simply because they were perceived as gay. Kevin T. Berrill, *Anti-Gay Violence and Victimization in the United States: An Overview* in *Hate Crimes: Confronting Violence Against Lesbians and Gay Men* 19, 20 (Gregory M. Herek & Kevin T. Berrill eds. 1992); *see also* Gregory M. Herek et al., *Psychological Sequelae of Hate Crime Victimization Among Lesbian, Gay and Bisexual Adults*, J. Consulting & Clinical Psychol. 1 (1999) (study of 2259 lesbians, gay men, and bisexuals found approximately one-fifth of females and one-quarter of males had experienced bias-related criminal victimization).[19] The phenomenon of "gay bashing," in which people known or perceived to be gay are subjected to brutal, sometimes fatal, beatings, has been well documented nationally. *See, e.g.*, Brian Magruder et al., *The Relationship Between AIDS-Related Information Sources and Homophobic Attitudes: A Comparison of Two Models*, 25 J. Homosex. 47, 48 (1993). The problem has been particularly acute in Texas. *See* Susan Parrott, *Panelist Says Hate Crimes Legislation Is A Start, But Not a Cure-All*, Associate Press News Wires, Sept. 7, 2001 (noting that 20% of hate crimes in Texas were

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[19] Crime statistics confirm this picture. *See* Federal Bureau of Investigations, *Hate Crime Statistics 2001*, *at* http://www.fbi.gov/ucr/01hate.pdf. (1,664 reported hate crimes nationwide in 2001 were suffered by gay, lesbian, or bisexual victims, with 55 cases reported in Texas); Nat'l Coalition of Anti-Violence Programs, *Report: Anti-Lesbian, Gay, Bisexual and Transgender Violence in 1998*, at 10-15 (Apr. 6, 1999) (anti-gay violence resulting in murder skyrocketed by 136%, serious assaults were up 12%, inpatient hospitalizations rose by 108%). Many gay and lesbian crime victims are further victimized when they report the crime to the police. *Id.* at 21-24 (20% of people reporting anti-gay incidents were verbally and/or physically abused by police).

committed against gays and lesbians and that since 1988 eighteen gay men in Texas had been killed in hate-motivated attacks); *Killing of a Gay Resident Stirs Activism in an East Texas Town*, New York Times, Dec. 27, 1993 at A12 (reporting that 1989 survey found Texas second only to North Carolina in reported attacks on homosexuals).[20]

Sodomy laws reinforce individual hostility against gay people and thus may be perceived as implicitly endorsing continued personal violence against them. *See* Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 Harv. C.R.-C.L. L. Rev. 103, 104 (2000) ("By labeling gay men and lesbians as criminals, sodomy laws make gay individuals targets for physical violence in the form of gay bashing, sometimes perpetrated as *de facto* enforcement of sodomy laws."); Kendall Thomas, *Beyond the Privacy Principle*, 92 Colum. L. Rev. 1431, 1490 (1992) ("[T]he criminalization of homosexual sodomy and crimes of homophobic violence mutually reinforce one another.").

Finally, sodomy laws act as a barrier to the eradication of prejudice. In the absence of first-hand knowledge, negative beliefs and fear of the different or unknown may grow into hatred for members of the alien group. Gordon Allport, *The Nature of Prejudice* 264-68 (1954). Conversely, familiarity tends to dispel prejudice. For example, a person who has gay-colleagues, friends, or relatives is substantially less likely to hate gay people and to harbor false stereotypes about the character and behavior of gay people generally. *See* Herek, *Stigma*, at 76-77 (citation omitted). But for such interaction to occur, the gay man or lesbian must disclose

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[20] Sodomy statutes may discourage victims of gay bashings from reporting such hate crimes to the police due to the risk of "secondary victimization" from law enforcement officials and others who learn about their sexual orientation. *See* Gregory M. Herek & Kevin T. Berrill, *Primary and Secondary Victimization in Anti-Gay Hate Crimes: Official Response and Public Policy*, 5 J. Interpersonal Violence 401, 401-13 (1990).

his or her sexual orientation. The greatest impediment to that disclosure is the fear of stigmatization that might follow. *See* Caitlin Ryan & Donna Futterman, *Lesbian and Gay Adolescents: Identity Development*, 19 School Nurse News 18, 18 (May 2002) ("Because the repercussions of disclosing one's homosexuality can be extremely negative, including loss of job, loss of family and friends, victimization, and violence, many lesbians and gay males share their sexual identities only with other gay people. This limits awareness of the diversity of human sexuality. . . ."). By using the threat of the criminal law to reinforce such stigmatization, sodomy laws discourage gay people from revealing their sexual orientation, thereby making the eradication of prejudice more difficult.

In all these ways, the Homosexual Conduct Law strikes a devastating blow to the mental and physical well being of gay people – harming, rather than serving, the public health.

CONCLUSION

The judgment of the Texas Court of Appeals should be reversed.

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Respectfully submitted,

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